IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 140

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner,

v.

AMERICAN BROADCASTING CO., INC., and
MUTUAL BROADCASTING SYSTEM,
Respondents.

BRIEF ON BEHALF OF MUTUAL BROADCASTING SYSTEM, INC., RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner seeks the issuance of a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on April 8, 1948 (R. 167-171; 167 F. 2d 349 (C. C. A. 2d, 1948)), which unanimously affirmed an order of the District Court of the United States for the Southern District of New York, entered on November 12, 1947, denying petitioner's motion for preliminary injunction (R. 149, 150).

Facts

Nature of the Action.

Plaintiffs, Gordon P. Brown and Federal Broadcasting System, Inc. (petitioner), are the former and present owners, respectively, of radio broadcasting station WSAY located in Rochester, N. Y. (R. 3). Defendants are the four major radio networks, namely, National Broadcasting Company,* Columbia Broadcasting System, Inc.,** American Broadcasting Company, Inc.,† Mutual Broadcasting System, Inc.,‡ and one officer of each of the latter two networks (R. 4, 5). Only Mutual and ABC are parties to the motion here involved (R. 24-27).

This action is brought under Sections 4 and 16 of the Clayton Act (15 U. S. C., §§ 15, 26) and Section 313 of the Federal Communications Act of 1934 (47 U. S. C., § 313) for alleged violations by defendants of Sections 1 and 2 of the Sherman Anti-Trust Act (15 U. S. C., §§ 1, 2) (R. 4). Plaintiffs seek the issuance of permanent injunction, treble damages, and the revocation by court decree of the radio station licenses issued by the Federal Communications Commission to ABC, NBC and CBS (R. 22, 23).

The Complaint.

The complaint charges that the four major radio networks are engaged in a general conspiracy in restraint of trade (R. 18). Stripped of all verbal embellishment, plaintiffs allege that this network conspiracy, operating through affiliation contracts with local stations, has sought, acquired and exercised the power to fix prices and to exclude broadcasting stations not affiliated with the networks from

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* Hereinafter referred to as NBC.

** Hereinafter referred to as CBS.

† Hereinafter referred to as ABC.

‡ Hereinafter referred to as Mutual.

all access to the national radio advertising market (R. 18, 19). It is also alleged that Mutual and ABC have conspired to boycott the petitioner (R. 19, 20).

Mutual filed a verified answer to the complaint. The answer denies all allegations of conspiracy, price-fixing and boycott and any other violation of the Anti-Trust Laws (R. 84-88).

The Motion for Preliminary Injunction.

On the same day that the complaint was served, petitioner moved for a temporary injunction (R. 24-27). Only the respondents herein, ABC and Mutual, were made parties to the motion. At the time that this motion was heard by the District Court the time for the filing of answer by the defendants had not yet expired and as a result the only answer before the court was that of Mutual.

By its motion petitioner sought a mandatory injunction *pendente lite* requiring the two respondents to furnish Radio Station WSAY with their network programs. The record indisputably demonstrated and petitioner conceded that Mutual was not under any contractual obligation to furnish network program service to WSAY (R. 78, 45).

In support of its motion, petitioner filed voluminous affidavits containing, for the most part, only conclusory averments unsupported by factual data (R. 30-59). Respondents filed answering affidavits (R. 59-84, 89-148). The opposing affidavits raise critical disputes as to the facts which are basic to plaintiffs' cause of action. However, the following undisputed facts, which are not alluded to in the petition, emerge from these affidavits:

From 1936 until 1947, there were three full time radio stations in Rochester, namely, WSAY, WHAM and WHEC. Until the promulgation of the Federal Communications Commission's Chain Broadcasting Regulations in 1941, WHAM and WHEC were the exclusive affiliates of the National Broadcasting Company and the Columbia Broadcasting System respectively (R. 73, 91).

In 1940, WSAY entered into an affiliation agreement with Mutual. Under this agreement WSAY became the outlet for the broadcasting of Mutual network programs in the Rochester area. This contract was renewed until 1943, when it expired (R. 70, 79). In the interim, the Chain Broadcasting Regulations, promulgated in 1941, had effected the severance of the American Broadcasting Company from the National Broadcasting Company. Thus, in 1943, a situation existed in Rochester wherein two major radio networks had no affiliated stations in Rochester and WSAY had a monopoly over the only available unaffiliated full time outlet (R. 73, 91).

Shortly after the expiration of the affiliation agreement between Mutual and WSAY, Mutual offered that station a new affiliation contract. WSAY refused to enter into any such agreement, frequently reiterating that network affiliation and income were of no advantage (R. 80). Periodic negotiations were subsequently had between Mutual and WSAY with the view toward executing an affiliation agreement. During these negotiations WSAY rejected the offer of an affiliation arrangement, stating that it was that station's intention to sell its local facilities directly to national advertisers, thus rendering the network's facilities unnecessary (R. 80, 81).

Despite WSAY's refusal to enter into an affiliation arrangement Mutual continued its relations with WSAY, contracting with WSAY on an individual basis for each network program for which Rochester coverage was desired (R. 80).

In 1945, WSAY, without giving the usual notice required in the broadcasting trade, increased its hourly broadcasting rate from $160 per hour to $280 per hour. The ostensible occasion for the rate increase was an increase in WSAY's power from 250 to 1,000 watts. In addition, WSAY reserved the right to recapture or cancel broadcasting time committed to Mutual's advertisers on short notice (R. 71, 81, 82).

The increase in price was entirely out of proportion to the increase in coverage (R. 71, 81, 82). The rate of station WHEC, the CBS affiliate in Rochester, was $175 for its 5,000-watt facilities as compared with the $280 demanded by WSAY for its 1,000-watt facilities (R. 72). Moreover, station WSAY had the lowest measured audience rating of all of the Rochester stations (R. 83, 84).

Mutual immediately received numerous protests from its advertisers who properly claimed that the size of the increase was unwarranted and arbitrarily imposed without adequate notice (R. 71, 82, 83; see exhibit annexed to affidavit of Z. C. Barnes, R. 83, 84). This disproportionate price increase not only placed Mutual in a serious competitive disadvantage in regard to the other networks but gave WSAY preferential treatment in that it received a larger share of each national advertising dollar than was received by any comparable Mutual affiliate (R. 71, 72).

After this time Mutual frequently offered WSAY an affiliation contract, requesting only that a competitive price be agreed upon and that WSAY modify its policy of demanding the right of recapturing committed time on short notice. Time after time WSAY refused to sign any such affiliation contract (R. 72, 73, 79, 80). Since both Mutual and ABC required outlets in Rochester, WSAY, by keeping itself aloof from network affiliation, enjoyed the enviable position of being able to play the two networks against each other and to subject them and their advertisers to an extortionate price (R. 93, 99).

However, between 1943 and 1946 a threat to WSAY's monopolistic position in Rochester began developing. In 1943 a new station, WARC, applied to the Federal Communications Commission * for a license to operate in Rochester. To forestall this competitive threat WSAY immediately filed an application for a license to broadcast in a nearby locality. Because of technical limitations on available wave lengths, the granting of WSAY's application would have

* Hereinafter referred to as FCC.

automatically precluded the licensing of WARC (R. 94). At that time WSAY offered to enter into an affiliation agreement with ABC in return for cooperation by ABC in aiding WSAY to secure the new license (R. 94, 95). The affidavits below show that when this offer was made, WSAY notified ABC of its intention to discontinue carrying Mutual programs and to cancel all Mutual programs upon the expiration of contractual commitments (R. 105-107, 109). Petitioner's application was denied by the FCC.

In 1946 a group of 37 veterans organized the Veterans Broadcasting Company and applied for a license to operate in Rochester (R. 160). The Federal Communications Commission granted licenses to WARC on May 1, 1947 and WVET, the veterans' station, on June 2, 1947 (R. 92). Thus, two new affiliates became available as Rochester outlets for national radio network programs. Despite this, Mutual again offered WSAY a regular Mutual affiliation agreement, which was again refused. WSAY notified Mutual of its intention of purchasing a direct line from The New York Telephone Company to the WSAY control room, thus obviating the need for Mutual's transmission facilities (R. 74, 75; Exs. 24-27 annexed to affidavit of Gordon P. Brown).*

While negotiations with WSAY were under way Mutual also communicated with the two new Rochester stations as to the possibility of one of them becoming a Mutual affiliate (R. 74). After negotiations with both stations, Mutual entered into an affiliation agreement with WVET (R. 76, 77). The price negotiated between Mutual and WVET was $175 per hour for its 5000 watt station, a price in sharp contrast to the $280 per hour demanded and previously obtained by station WSAY for its 1000 watt coverage (R. 76).

Pending the construction and operation of WVET, Mutual continued to provide WSAY with programs. These programs were provided on an individual commitment basis

* The exhibits attached to the affidavit of Gordon P. Brown are not printed in the Record but have been filed by petitioner with this Court.

under an arrangement which, plaintiffs concede, was cancellable at will (R. 45, 78). In early October, 1947, it was estimated that WVET would be ready to commence operations about November 10, 1947. Therefore, by letter dated October 11, 1947 Mutual, although concededly no notice of cancellation was required (R. 45), notified WSAY by registered mail of its intention to cancel its existing relationships with WSAY, effective November 10, 1947 (Ex. 30 annexed to affidavit of Gordon P. Brown). Delays in the completion of station WVET made Mutual's predictions some ten days premature. As soon as Mutual learned of this delay, it immediately offered to continue furnishing WSAY with programs until WVET was ready to commence operations. WSAY accepted this offer (R. 45, 78).

On November 12, 1947, Mutual notified WSAY of the cancellation of its existing program commitments effective November 19, 1947. On November 22, 1947, WVET commenced operations, and since that date has broadcast the programs of the Mutual network.

On the basis of these undisputed facts and the conflicting assertions contained in the record before it, the District Court, after full argument by all parties, including WVET which was granted leave to intervene (R. 155-164, 149), denied the motion for preliminary injunction (R. 149, 150).

Petitioner filed notice of appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 150). Immediately thereafter petitioner moved before Judge Coxe, who had heard the original motion, for a stay pending appeal. The motion was denied. A similar motion was made to the Circuit Court, which, after argument before a full bench (Judges Learned Hand, Augustus Hand and Jerome Frank), was denied. On appeal to the Second Circuit the order denying preliminary injunction was unanimously affirmed (Judges Learned Hand, Augustus Hand and Swan) in an opinion by Augustus Hand, J. (R. 167-171; 167 F. (2d) 349 (C. C. A. 2d, 1948)). Petitioner now seeks review by this Court of this judgment of the Circuit Court.

The Decision of the Circuit Court

Petitioner seeks certiorari on the ground that the decision of the Circuit Court announces certain basic principles of anti-trust law which should be reviewed by this Court. The petition urges as ground for the issuance of the writ that the Circuit Court of Appeals erred in holding: (1) that the networks have the right to fix the price that local stations may charge national advertisers for broadcasts; (2) that the networks have the right to exclude unaffiliated stations from all access to the national advertising market; (3) that the FCC's Chain Broadcasting Regulations sanctioned price fixing and exclusive practices; and (4) that a uniform course of dealing by the networks which excludes unaffiliated stations from the national advertising market does not constitute a prima facie conspiracy in violation of the Sherman Act (Petition, pp. 4, 5). None of these legal principles was decided by the Court below.

The Circuit Court merely held that the District Judge had not abused his discretion in denying preliminary injunction. At the outset of his opinion, Judge Augustus Hand stated:

> "This is an appeal by the plaintiff from an order denying a motion for a preliminary injunction. Such orders are largely within the discretion of the judge hearing the motion and we have no reason to suppose that he abused his discretion in the present case" (R. 167, fol. 168).

In reaching this determination, the Circuit Court applied the well established principle that a preliminary injunction will not issue where the right to such relief is not clear. Finding the factual matter in the record insufficient to support petitioner's allegations of conspiracy, boycott and price fixing, the Court stated:

> "In the record now before us there is no persuasive evidence of a conspiracy to boycott or otherwise unlaw-

fully exclude the plaintiff from obtaining defendants' programs, whatever may later be established at a trial" (R. 169, fol. 170).

On the motion, petitioner claimed that respondents had violated the Sherman Act because: (1) the affiliation agreements of the four major networks with their local stations contained substantially uniform provisions; (2) the respondents, Mutual and ABC, cancelled their existing relationships with WSAY at approximately the same time; (3) the networks fixed the price for which they sold their facilities to national advertisers; (4) the affiliation agreements contained provisions which were "exclusive" in nature. The Court below carefully reviewed the factual basis submitted by petitioner for these claims and found that the proof was too unpersuasive and conflicting to warrant the granting of injunctive relief prior to the trial.

The So-Called "Uniform Course of Dealing".

Petitioner's allegations of unlawful conspiracy among the networks are largely predicated on the alleged uniformity of the affiliation agreements of the various networks and the business dealings thereunder.

The record before the Circuit Court shows certain basic differences between the affiliation agreements of the various networks. The record further demonstrates that such similarities as exist are the necessary product of an industry whose very nature presents certain problems and dictates certain practices common to all who engaged in it and of the necessity of such agreements complying with the Chain Broadcasting Regulations of the Federal Communications Commission, which are largely determinative of their contents.

The Court below, referring to this contention of petitioner, stated:

"The further claim that certain business practices of the networks and terms of the affiliation agreements

> required by them as a condition for furnishing programs showed a conspiracy because of a general uniformity in form and practice is also unpersuasive. We cannot say that such similarity results from anything more than common business solutions to identical problems in a competitive industry, and the forms used may well merely indicate similar business practices or formulations such as we find in insurance policies, bills of lading, warehouse receipts and other commercial documents. Moreover, the similarity of many of the terms in these contracts might be explained by requirements of the Federal Communications Commission governing the stations" (R. 170, fols. 171, 172).

No general or novel principles of anti-trust law are involved in this determination.

The So-Called "Boycott".

As illustrative of the claim that respondents were attempting to jointly boycott the petitioner, petitioner has pointed to the fact that WSAY received notices of cancellation by Mutual and American Broadcasting Systems of programs furnished WSAY at approximately the same time.

In view of the record before the Circuit Court which indisputably showed that the cancellation notices by the two networks were the result of a competitive race by these networks to have their respective new affiliates be the first new station to operate in the Rochester area and that the cancellations were concededly given pursuant to contractual right (R. 92-96; Ex. 30 annexed to affidavit of Gordon P. Brown), Judge Hand stated:

> "* * * The simultaneous aspect of their notices is an insufficient basis for the charge of concerted action when it is remembered that American and Mutual were both in a position where time was of the essence in their competition with each other to put into operation as soon as possible their new affiliation contracts with WVET and WARC" (R. 170, fol. 171).

Again, no broad principle of anti-trust law was involved.

The So-Called "Price Fixing".

Petitioner's allegations of price fixing are based on the unusual premise that it is unlawful, *per se*, for a network to have a voice in the price to be paid by national advertisers for the use of its facilities.

The affidavits of petitioner and respondent agree that advertisers purchase three types of radio time. First, the local or national advertisers can purchase program time on a single local station. This is known as local time. Second, both local and national advertisers can purchase time on a single local station for a short announcement immediately preceding or following a regular program. This is known as "spot" time. Third, advertisers can purchase time over the whole or a portion of a national network for the broadcast of a network program. This is known as national network time (R. 8, 62).

Petitioner has not contended that respondents have any voice in fixing the price to be charged advertisers for local time or spot time. The sale of such time involves only the facilities of the local station in which the network has no interest. The purchase of national network time, however, involves the purchase of the aggregate facilities of the stations comprising the network and the facilities of the network itself, including transmission facilities, sales facilities, promotion facilities, etc. Not only the local stations but the networks have a direct interest in the price to be charged for these aggregate facilities (R. 62, 66, 72, 73, 82).

In view of the facts set forth in the record, the Court below held that petitioner did not have the right, *per se*, to use not only its own facilities but those of the network and still be the sole determiner of the price to be charged for these joint facilities. Judge Hand stated:

> "* * * Plaintiff had no inherent right to set its own rate to an advertiser and in all other respects to use the facilities of the radio network, nor does the court have power to compel defendants to deal with the

plaintiff on such terms. Plaintiff misconceives the function of a network, which buys time from the stations and sells to the advertisers its facilities and the services of those stations as an aggregate. Not only are the networks not common carriers, but it would be cumbersome if not impractical for them to furnish programs if they did not have authority to deal independently with the advertising concerns instead of leaving the rates to be determined individually by the different stations which they serve. Such control by a network, operating as a single coordinating agency, would seem to be at least desirable in order that it might compete with other networks and advertising media and to assure a more reasonable distribution to every station of the income which the network as a whole may receive. We do not say that it would be impossible for a network to allow each station to set its own rate, but it would seem a less practical course of business and certainly one to which plaintiff can make no claim as of right" (R. 169, fols. 170, 171).

The So-Called "Exclusive" Affiliation Agreements.

Petitioner's final claim is that the network affiliation agreements violate the Sherman Act because they create a mutually "exclusive" relationship between a single network and a single station in a given territorial area.

On the motion, the Court below had before it the various affiliation agreements of the four networks. Respondent demonstrated, without contradiction by petitioner, that its affiliation agreements complied in all respects with the Chain Broadcasting Regulations of the FCC (R. 62-65). These regulations prescribe in detail the terms under which a local station can permissibly contract with a national network.

The record is clear that an affiliated local station does not obtain territorial exclusivity over the programs of a network. The affiliation agreements, on their face, merely grant to the local stations the right of "first call" on network programs (Ex. 20 annexed to affidavit of Gordon P. Brown). The network has the right to make available any

program rejected by its affiliate to any other station in the same territorial area. The right of first call is specifically authorized by a Regulation of the FCC (FCC Regulation 3.102) and no contention has been made that Mutual's affiliation agreements in any way violate this regulation.

In view of these clear facts in the record, the Court stated:

> "We think it improper to grant a preliminary injunction upon the charge that the networks have unlawful 'exclusive' contracts with their stations where the Federal Communications Commission, after protracted hearings and consideration not only of the general public interest but of the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of the affiliation contracts at present in use and the defendants have given reasonable grounds for denying their exclusiveness or illegality. See F. C. C. Report on Chain Broadcasting, Comm. Order No. 37, Docket No. 5061, May, 1941, p. 46; *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 223" (R. 170, fol. 172).

Not only did the Court below find that the petitioner had failed to show a clear right to the injunctive relief sought but it also found that the granting of such relief would impose a new status on the parties rather than maintain the *status quo* and would inflict substantial injury on the respondents and on WVET and WARC. It therefore stated:

> "We cannot see any reason for requiring the defendants to maintain existing arrangements for providing programs for plaintiff when by the very terms of those agreements they might be cancelled and when a failure to recognize the cancellations as valid might jeopardize the new affiliation contracts made by these defendants with WVET and WARC" (R. 170, 171, fol. 172).

Questions Sought to be Reviewed

The foregoing discussion and a reading of the Circuit Court's opinion demonstrate that the legal principles of which petitioner seeks review were neither in issue nor decided by the Court below.

The sole question which could be reviewed by this Court is whether the District Court and the Circuit Court have both abused their discretion in denying preliminary injunction where:

(a) no clear right to the relief sought has been shown;

(b) the granting of relief would not merely maintain the *status quo* but would impose a new legal obligation on the parties; and

(c) the granting of the relief would inflict on the respondents and third parties greater injury than would be inflicted on petitioner if relief were denied.

POINT I

Certiorari will not be granted to review the exercise of discretion in the making of an interlocutory order where no special circumstances exist requiring review prior to final judgment.

A. Certiorari will be issued to review an interlocutory order only when necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause; no special circumstances requiring interlocutory review exist in this case.

This Court has frequently reiterated that the issuance of writ of certiorari is limited to cases of particular gravity and public importance. *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 (1922); *Layne & Bowler Corp.* v.

Western Well Works 261 U. S. 387, 393 (1922); *Field* v. *United States,* 205 U. S. 292, 296 (1906); *Matter of Woods,* 143 U. S. 202 (1891). Where the judgment sought to be reviewed is an interlocutory one, not only must it be shown that the judgment presents issues of grave public concern but it must also be shown that special circumstances exist which require review prior to final judgment. *Meccano, Ltd.* v. *Wanamaker,* 253 U. S. 136, 140-142 (1919); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U. S. 251, 258 (1915); *United States* v. *Beatty,* 232 U. S. 463, 467, 468 (1913); *Forsyth* v. *Hammond,* 166 U. S. 506, 513-515 (1896); *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co.,* 148 U. S. 372 (1892).

In *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co., supra,* Justice Grey stated at page 384:

> "• • • Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

Similarly, in the *Hamilton-Brown Shoe Co.* case, *supra,* Justice Pitney held that the fact that the order sought to be reviewed was an interlocutory one "itself alone furnished sufficient ground for the denial of the application". See also *John Simmons Co.* v. *Grier Bros. Co.,* 258 U. S. 82, 91 (1921).

There are no special circumstances in this case which require review prior to final judgment. The order sought to be reviewed will be incorporated in the final judgment of the lower court and the fact that certiorari is now

denied will in no way effect the issuance of certiorari by this Court to review the final judgment. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 398, 418 (1922). On the other hand, the granting of certiorari at this preliminary stage of the proceedings would involve a piecemeal handling of appeals. The impropriety of such a procedure has often been expressed by this Court. See, e.g., *Heike* v. *United States*, 217 U. S. 423, 428, 429 (1909).

Anti-trust cases are, by their nature, complicated. They almost invariably involve multiple factual issues and often present questions basic to our entire economy. See, e.g., *United States* v. *Aluminum Co. of America*, 44 F. Supp. 97 (S. D. N. Y., 1941). On the basis of a few affidavits, petitioner has sought to overrule the holding of this Court that radio networks are not common carriers (*F. C. C. v. Sanders*, 309 U. S. 470, 474 (1939)), with the exception that, under petitioner's thesis, instead of a commission fixing the rates to be charged for network service, petitioner would, without negotiation, fix respondent's charges. To attempt to adjudicate broad principles of anti-trust law on the basis of the generalizations contained in petitioner's affidavits and without the benefit of the probing factual determinations of a trial would be improper. Neither the interests of the petitioner, the respondent nor the public require this Court to deal with factual abstractions.

The inappropriateness of review at this time is emphasized by the fact that although petitioner's allegations of conspiracy and price fixing are directed against the four major network-defendants, only two of these defendants are parties to the motion for preliminary injunction. The National Broadcasting Company and the Columbia Broadcasting System were not heard on the motion and, in fact, their answers to petitioner's complaint had not been served by the time of the hearing before the District Court. It is difficult to conceive how this Court could properly review the broad questions of conspiracy involved where

two of the major parties alleged to be part of the conspiracy have not as yet had an opportunity to be heard or even to file affidavits in opposition to petitioner's contentions.

Petitioner argues as ground for review at this time that under the decision of the Circuit Court, even if it could produce additional evidence of conspiracy at trial, it would still be denied relief. There is nothing in the decision of the Court below to sustain this contention. The opinion of the Circuit Court leaves the door open to petitioner to produce at the trial any relevant evidence which it has in support of its allegations. What petitioner is perhaps attempting to state is that trial would be futile because it has no evidence to produce beyond that contained in its affidavits. If this is the case, it does not militate against the exercise of discretion by the Court below. It may, however, indicate that petitioner has no case.

B. It is not the function of certiorari to bring up for review interlocutory orders involving only questions of discretion.

The sole question before the Circuit Court, as in the case of any appeal from the denial of preliminary injunction, was whether or not the District Judge had abused or improvidently exercised his discretion in denying preliminary injunction. *Rogers* v. *Hill,* 289 U. S. 582, 586, 587 (1932); *Alabama* v. *United States,* 279 U. S. 229, 230, 231 (1928); *Meccano, Ltd.* v. *Wanamaker, supra.* It is not the office of the writ of certiorari to bring up for review interlocutory orders involving only the exercise of discretion.

In *Robertson and Kirkham,* Jurisdiction of the Supreme Court of the United States (1936 Ed.), the authors state at pages 627, 628:

> "Where the question presented on petition for certiorari is whether interlocutory injunction should or should not have been granted, it is necessary to give

consideration to another rule. It is well settled that an application for interlocutory injunction is addressed to the sound discretion of the trial court, and that, on appeal from an order granting or denying such relief, the duty of the appellate court, at least generally, is not to decide the merits of the case but simply to determine whether the discretion of the trial court has been abused. This rule, as well as the rule respecting reluctance to review non-final decrees and judgments generally [see Subpoint A, *supra*], is a consideration affecting the exercise of the Supreme Court's certiorari jurisdiction."

This principle was applied by this Court in the case of *Wilshire Oil Co.* v. *United States,* 295 U. S. 100 (1934). In that case the District Court granted preliminary injunction. The Circuit Court affirmed. An attempt was made to have certain constitutional questions, purportedly raised in the District Court, certified to this Court. In a *per curiam* opinion the Court stated, at pages 102 and 103:

"This Court is of the opinion that * * * the question before the Court of Appeals upon the appeal from the interlocutory order is whether the District Court abused its discretion in granting an interlocutory injunction; that the Court of Appeals is not bound to decide, upon the allegations of the bill, an important constitutional question, as to which the Court of Appeals is in doubt, in advance of an appropriate determination by the District Court of the facts of the case to which the challenged statute is sought to be applied.

"Nor should this Court undertake to determine the constitutional validity of the statute upon such questions as those which have been certified. If this Court were to deal with the case in its present stage, it would be necessary to order up the entire record, so that the allegations of the bill, and the case as presented to the District Court, could be properly considered. That course would merely bring before this Court the interlocutory order and would result in unnecessary delay in the final determination of the cause. The certificate is therefore dismissed."

The decision of the Court below rests primarily on the proposition that the petitioner has made insufficient factual showing to warrant the granting of the extraordinary relief sought (see pp. 8-13, *supra*). Certiorari will not be issued by this Court to review evidence or to re-examine inferences to be drawn from the facts in the record. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1937); *F. T. C.* v. *American Tobacco Co.*, 274 U. S. 543 (1926); *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440 (1917). Nor can the writ be used merely to provide a party defeated below with another hearing. *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 (1922).

Petitioner's attempt to read broad principles of anti-trust law into the decision of the Circuit Court does not withstand scrutiny. The legal principles sought to be reviewed were neither in issue before nor decided by the Circuit Court. Moreover, there is nothing in the opinion below in any way inconsistent with decisions of this Court relating to the relationship of the Anti-Trust Laws to radio broadcasting.

Petitioner contends that the Circuit Court's holding that petitioner had failed to establish a clear right to unilaterally determine the rate to be charged for network programs involves the announcement of a legal principle inconsistent with the language of this Court in *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 209 (1941). In support of this contention, petitioner quotes from a portion of that opinion. The quotation is inaccurate and incomplete. For the purposes of accuracy it is set forth in full herein. The question before this Court was the validity of the Chain Broadcasting Regulations of the FCC. In discussing the regulation governing price fixing, Justice Frankfurter stated at page 209:

> "The Commission concluded that 'it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business.

> We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers' (Report, p. 75). [Accordingly, the Commission adopted Regulation 3.108, which provides as follows: 'No license shall be granted to a standard broadcasting station having any contract, arrangement or understanding, expressed or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time *for other than the network's program.*']" (Portion in brackets omitted in petitioner's brief. Italics supplied.)

This regulation prohibits a network from having any voice in the determination of the rate to be charged advertisers for the facilities of the local stations alone. This case does not involve any contention that the networks have fixed prices where only the sale of the facilities of a local station were involved. However, the regulation specifically excludes from the prohibition the sale of network programs and, in effect, authorizes negotiation of the network program prices between the network and the stations. There is, thus, nothing in the opinion below which in any way conflicts or contravenes the holding of this Court or the regulations of the FCC in regard to the fixing of network program prices.

Petitioner also contends that the holding of the Court below that petitioner had failed to produce sufficient factual evidence to support its allegations of conspiracy involves a legal principle in contravention of the policy of the FCC. It is argued that the decision below sanctions territorial exclusivity. This contention is untenable.

Prior to the promulgation of the Chain Broadcasting Regulations in 1941, some of the networks entered into affiliation contracts with local stations whereby the local stations obtained territorial exclusivity over all the networks' programs. After an exhaustive survey, the Federal Communications Commission determined that these exclusive ar-

rangements were not desirable since if any given program was rejected by the local station, no other local station could carry it and the public in the area would thereby be deprived of the program. The Commission also determined that it was undesirable and wasteful for two stations in the area to duplicate the same program. See *National Broadcasting Co.* v. *United States, supra,* at pp. 200, 201. It, therefore, promulgated a regulation providing, in effect, that a local station could contract with a network for "first call" on all the networks' programs but requiring that if the local station did not accept the program the network must be free to offer the program to any other station in the area. This Regulation, No. 3.102, reads as follows:

> "• • • No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. *This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.*" (Italics supplied.)

The affiliation contract of Mutual, which was before the Court below, is in explicit compliance with this Regulation and petitioner has never contended to the contrary. No legal principle is announced by the Court below in any way inconsistent with the policy of the Federal Communications Commission expressed therein.

Contrary to petitioner's claim, the opinion of the Court below does not decide that the FCC Regulations sanction or provide immunity against prosecutions for violations of the Anti-Trust Laws. The Court merely held that where, on the one hand, an inadequate showing of conspiracy had

been made by the petitioner and where, on the other hand, an undisputed showing had been made by each respondent that its affiliation agreements in all respects complied with the validated regulations of the Federal Communications Commission, the Court, on application for preliminary injunction, could not adjudicate that the contracts, *per se*, violated the Anti-Trust Laws (Opinion 170, fol. 172; see pp. 12, 13, *supra*).

C. The decision of the Circuit Court does not conflict with any decision of this Court or any other Circuit Court.

Petitioner claims that the decision of the Circuit Court in this case conflicts with the decisions of other Circuits in *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2nd 738 (C. C. A. 3rd, 1945), *Bigelow* v. *RKO Radio Pictures*, 150 F. 2nd 877 (C. C. A. 7th, 1945), *American Tobacco Co.* v. *United States*, 147 F. 2nd 93 (C. C. A. 6th, 1944), and of this Court in the latter case (328 U. S. 781 (1946)). This contention is without merit.

In all of the aforecited cases the findings of conspiracy, price fixing, etc., were made only after a full trial on the merits. In all these cases voluminous factual matter was submitted to the Court supporting the ultimate determination that violations of the Anti-Trust Laws had occurred. It was only after the factual context had been clearly supplied that the Court applied the legal principles espoused by petitioner in this case. Petitioner seeks the application of these principles on the basis of a few affidavits containing factual disputes as to the critical elements of the case and in the absence of any judicial determination of these facts.

To contend that the decision of the Circuit Court in this case conflicts with decisions in which legal principles were applied only after the facts were judicially determined completely overlooks realities. The petition herein prays that this Court apply legal principles to factual abstractions. That is not the purpose of review by this Court by writ of certiorari.

CONCLUSION

The petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 140

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner,

v.

AMERICAN BROADCASTING CO. and MUTUAL BROADCASTING SYSTEM,
Respondents.

Memorandum on Behalf of Mutual Broadcasting System, Inc., Respondent, in Answer to Memorandum for the United States as Amicus Curiae in Support of the Petition for Writ of Certiorari

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We feel that respondent's main brief clearly demonstrates the impropriety of review at this time. However, the misconceptions as to the opinion of the Court of Appeals contained in the Solicitor General's memorandum (hereinafter referred to as "memorandum"), constrain us to file this reply.

The Solicitor General urges the granting of certiorari on the ground that the opinion of the Court below announced certain erroneous broad principles of anti-trust law. This claim, however, is founded upon a fundamental misconception of the opinion's true scope and purport.

The memorandum contends that the Court of Appeals announced the principle that the FCC Chain Broadcasting Regulations sanction violation of the Anti-Trust Laws. This contention is based on the refusal of the Court below to accept as a basis for preliminary injunction petitioner's unsubstantiated allegations that the affiliation agreements between the networks and the stations are illegally "exclusive". The only support for this view consists of isolated statements of the Court below which the memorandum incompletely quotes out of context. To avoid any misapprehensions the full statement of the Court below, in declining to find that the affiliation agreements were "exclusive" and per se illegal, is set forth herein:

> "We think it improper to grant a preliminary injunction upon the charge that the networks have unlawful 'exclusive' contracts with their stations where the Federal Communications Commission, after protracted hearings and consideration not only of the general public interest but of the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of the affiliation contracts at present in use and the defendants have given reasonable grounds for denying their exclusiveness or illegality" (R. 170, fol. 172).

The Court of Appeals' denial of preliminary injunction was based on a number of factors, namely: (a) that petitioner had failed to substantiate its bare allegations that the affiliation agreements created exclusive or illegal relationships between the networks and their stations, (b) that respondent had provided "reasonable grounds for denying their [the affiliation agreements] exclusiveness or illegality" (R. 170, fol. 172); (c) that the affiliation agreements complied in all respects with the FCC Chain Broadcasting Regulations, which were intended to prohibit and do prohibit "exclusive" arrangements between the networks and their affiliated stations (see Respondent's main brief, p. 5).

There is nothing in the statement quoted above which conflicts with the principle approved by this Court that the FCC was "not charged with the duty of enforcing" the Sherman Act. *National Broadcasting* v. *U. S.*, 319 U. S. 190, 223. The Court of Appeals, however, properly gave weight to the principle likewise approved by this Court, that the FCC, "although not charged with the duty" of enforcing the Sherman Act, was under a duty "to administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve". *National Broadcasting* v. *U. S.*, supra, at p. 223. The recognition of this principle by the Court below as one of the factors militating against a preliminary injunction, in no way indicated or implied an adoption of the view that the Chain Broadcasting Regulations grant immunity against anti-trust prosecution.

Equally untenable is the Solicitor General's contention the Court below held that the networks have an inherent right to fix the rates at which independent stations may offer their facilities to advertisers (Memorandum, p. 5).

No contention was made below by petitioner that the networks sought to fix the rates to be charged by the local stations for the latter's own facilities. The sole issue with regard to price-fixing revolved around petitioner's claim that the networks should have no voice in determining the rate at which *national network time* should be sold to a national advertiser, in spite of the fact that the sale of such time involves not only the aggregate facilities of the stations comprising the network, but also the facilities of the network itself (Respondent's main brief, pp. 11, 12).

The Court below merely rejected the contention of petitioner that it had an inherent right to set its own network rate to an advertiser and in all other respects to use the facilities of the network, without any voice by the network as to the terms under which such facilities

would be made available (Respondent's main brief, pp. 11, 12, 19, 20).

Contrary to the statement in the memorandum, and as pointed out in our main brief (pp. 8-13, 17, 19-22), there is no erroneous expression of substantive law in the opinion below which would prevent petitioner from attempting to produce evidence of violation of the Anti-Trust Laws upon the trial of this action. The Court below properly limited its determination to the question of whether or not the District Court abused its discretion in denying the extraordinary relief sought. The legal principles discussed in respondent's brief which demonstrate the inappropriateness of review of the interlocutory discretionary order at this time, are clearly applicable (Respondent's main brief, pp. 14-22).

The attempt to inject into the litigation at this preliminary juncture legal issues which were neither before, nor decided by, the Courts below would serve neither the interests of the public or the parties. Conceding, arguendo, that "serious issues" may ultimately be involved, they cannot properly and should not be determined on the basis of a few affidavits. The factual disputes about which these issues revolve are many and complex and their resolution by trial is indispensable to proper judicial determination. The granting of certiorari at this stage would be contrary to established principles and would only result in a premature review of legal abstractions.

The petition for certiorari should accordingly be denied.

Respectfully submitted,

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